In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-38

MIKE BRUCE, ET AL.,
Appellants,

VERSUS

WICHITA STATE UNIVERSITY,
Appellees.

On Appeal from the
Supreme Court of the State of Kansas

RESPONSE OF APPELLANTS TO MOTION TO DISMISS APPEAL

LARRY A. TAWWATER
JOHN W. NORMAN, of
LAMPKIN, WOLFE, BURGER,
McCAFFREY & NORMAN
815 Cravens Building
Oklahoma City, Oklahoma 73102
(405) 272-9611

Attorneys for Appellants

September, 1976

UTTERBACK TYPESETTING CO. 519 W. CALIF., OKLAHOMA CITY. PH. 235-0030

In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-38

MIKE BRUCE, ET AL.,
Appellants,

VERSUS

WICHITA STATE UNIVERSITY,
Appellees.

On Appeal from the
Supreme Court of the State of Kansas

RESPONSE OF APPELLANTS TO MOTION TO DISMISS APPEAL

Following the filing by appellants of their Jurisdictional Statement, appellee, Wichita State University, moved for dismissal of this appeal. The motion is not well taken and should be denied.

Appellee asserts that this Court has consistently upheld the doctrine of governmental immunity. Yet, *none* of the cases cited by appellee in support of its contention addresses the issue presented by the case at bar. The statute now in issue was adopted by the Kansas Legislature following the complete and total abrogation of governmental immunity by the Kansas Supreme Court in *Carroll* v. *Kittle,*

203 Kan. 841, 457 P.2d 21 (1969). The legislative response was an overly broad immunity statute which recreates the same irrational classifications which caused the Kansas Court to abolish immunity in *Carroll.*

Appellants do not (as alleged by appellee) seek to derive their right to sue the State of Kansas from the Kansas or U. S. Constitutions, which was the case in *Palmer* v. *Ohio*, 248 U.S. 32, cited by appellee. On the contrary, following the holding in *Carroll, supra,* appellants *had* the right to bring such an action and such right was nullified by the statutes now in question. Thus, the issue in the present case is whether the abolition of existing rights is the result of irrational and unconstitutional legislation.

On the few occasions that this Court has directed its attention to governmental immunity, the review was sought of a lower court to judicially abrogate a longstanding legal doctrine. The present appeal, however, presents a wholly different issue: whether the statutorily imposed immunity comports with the Federal Constitution. This issue has never been determined by this Court and this case should, therefore, receive full review.

Appellee further contends that the subject immunity statute is reasonably related to legitimate state ends. However, the cases presented in support of that position merely state the guidelines to be used when considering the constitutionality of a state action. Chief Justice Fatzer, in his dissent to the second opinion, *Brown* v. *Wichita State University*, 219 Kan. 2, 547 P.2d 1015, discusses the statute in light of *Ferguson* v. *Skrupa*, 372 U.S. 725 (1963), cited

by appellee in its motion. Writing for a 4-3 minority, he found the statute created invidious discrimination and was thus repugnant to the Fourteenth Amendment.

The subject statutes create irrational classifications. For example, the State of Kansas and the City of Wichita can engage in the same activity, but only one can be held liable for its acts. The bases for this scheme are as anachronistic as the doctrine of immunity itself. Indeed, Chief Justice Fatzer persuasively exploded the three "myths" relied upon by the majority in the second opinion to support its finding that the statutes are constitutional. Those arguments, along with those appearing in the Jurisdictional Statement, need not be repeated here.

Appellants do not seek to substitute their judgment or that of the Kansas Supreme Court for the judgment of the Kansas Legislature. Appellants instead seek a review of certain legislation in light of the United States Constitution.

The appellee's assertion that the present appeal need not reach the constitutional issues is specious. Much of appellee's argument assumes that the issue of damages has been considered and that there is an upward limit on recovery. In fact, the issue has never even been addressed. When it is, the court will consider the contract signed by appellee which specifies Oklahoma law will apply. Oklahoma has no limit on damages. Moreover, even appellee concedes that in many of the cases, no upward limit would be applied on damages. In fact, many of appellants' cases unquestionably have damages far in excess of the $75,000.00 which appellants might be able to recover under a contract

theory. Furthermore, the appellants are not guaranteed of recovering under that theory and appellee's contentions are nothing more than speculation and not relevant to the real issue presented herein.

Finally, appellee contends that there is an adequate non-federal basis for the Kansas Court's decision. Yet, even a cursory reading of the two opinions by the Kansas Court plainly shows the Court's decisions were based upon the United States Constitution. As the cases cited by appellee note, the states have a right to govern and to enact laws, but these laws must not violate the Constitution. It is the duty of this Court to determine the validiy of a government's acts.

The only issue presently before this Court is whether plenary review should be granted. In the Jurisdictional Statement, appellants set forth two cases, *Louisville N. & R. Co.* v. *Melton*, 218 U.S. 36, and *Cohen* v. *California*, 403 U.S. 15, in which the Court outlined the standards to be applied in determining whether or not jurisdiction exists. Appellee chose not to address those cases, instead relying on cases which do not speak to the question at hand. The Kansas Supreme Court found the statutes in question to be invidious and discriminatory and then, by one vote, reversed that decision. A very real, very substantial federal question

of first impression for this Court has been created. Appellee's Motion to Dismiss should therefore be denied.

By LARRY A. TAWWATER
JOHN W. NORMAN, of
LAMPKIN, WOLFE, BURGER,
McCAFFREY & NORMAN
815 Cravens Building
Oklahoma City, Oklahoma 73102
(405) 272-9611

Attorneys for Appellants

September, 1976

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Response of Appellants to Motion to Dismiss Appeal were mailed first class, postage prepaid, to Robert Martin, Paul B. Swartz, and Lee Thompson, of Martin, Pringle, Schell & Fair, 320 Page Court, 220 West Douglas, Wichita, Kansas 67202, on this ..... day of September, 1976.

_____

Larry A. Tawwater
Attorney for Appellants